

Tendering Law & Bid Evaluation

Wrap Up

Some Observations

- Process was not transparent
- RFP and Bid Evaluation criteria inadequate or not detailed enough
- Project Authority (PA) should not have discussed with University nor accept that they prepare the RFP
- Via the Contracting Unit, PA should have done a RFI to get info or feedback to prepare SOW and have the Contracting Authority prepare the RFP
- If unable to write a SOW, get an independent contractor to do so
- Misinterpretation from PA on price ($\$200K + \text{GST} > \$200K \Rightarrow$ University should have been declared non-compliant as well

Tendering Procedures

- Tendering procedures must be applied in a non-discriminatory manner.
- Contracting authorities or any civil servants are strictly prohibited from providing a supplier any information with regard to a specific procurement that would have the effect of apparent favouritism.
- Contracting authorities must provide all suppliers with equal access to information with respect to a particular procurement during the period prior to the issuance of any notice or tender documentation

Cannot Act Arbitrarily

- Courts have established that the issuer of invitation documents **cannot act in an arbitrary manner**
 - the Contracting Authority is neutral – has no vested interest in the project itself and is the gatekeeper of the process
- Contracting unit has certain obligations to all potential bidders who receive or respond to an invitation to bid, not only to the winning bidder. One of these duties often relate to disclosure of information and treatment of bidders.

Conducting a Fair Process

- The consequence of a breach of the duty of fairness by a tendering authority in a way that undermines the integrity of the bidding process may be liability for contractual damages (typically lost profits).
- The Supreme Court of Canada has also given us a set of principles to protect the integrity of the bidding process.

Supervising the Process

Contracting authorities have the obligation to supervise all aspects of the procurement process, including verifying and approving evaluation results.

The CITT requires that the proposals be reviewed by the contracting authority with diligence and thoroughness.

Transparency

- Competing firms should be told the measurement criteria and the weighting assigned to them.
- Courts have ruled that the factors and their weighting must be established beforehand and adhered to strictly. They are to be recorded along with the requirements of the contract and included in the bid solicitation.
- The principle of applying bid criteria equally to all bidders is part of Trade Agreements requirements.
- Contracting Authorities should also take care to only evaluate compliant bids, on the basis of disclosed criteria.

Principles Governing Evaluation

To ensure fairness to all prospective bidders and transparency in the award process, the following principles should be respected:





1. The bid evaluation process must be clear and provide a concise method of ranking each bid;
2. The evaluation criteria must be written so that they can be clearly understood and objectively rated
3. The evaluation criteria must be appropriate for the type of bid solicitation
4. Only the terms, conditions and specifications outlined in the RFP are to be used as evaluation criteria
5. An evaluation criteria that has not been addressed receives a zero mark
6. Only information contained in the bid can be considered for evaluation

Establishing Bid Evaluation Criteria

Bid evaluation/contractor selection processes are to be established for each particular requirement by exercising good judgement and by observing the following guiding principles:

1. **Integrity:** Bid evaluation/contractor selection processes must be open, fair and honest
2. **Competition:** Bid evaluation/contractor selection processes must ensure fair competition and must be appropriate for each requirement
3. **Equal Treatment:** Bid evaluation/contractor selection processes must ensure that all bidders are subject to the same conditions and considerations
4. **Accountability:** procurement personnel are responsible and accountable for the integrity of the bid evaluation/contractor selection processes, including all actions taken within these processes

Types of Cases Ending Up at the CITT

-  The use of an ACAN to award a contract that does not meet the strict terms of the exceptions in the trade agreements.
-  The SOW in an ACAN or an RFP has been written to favour one supplier, and precludes consideration of other designs or approaches.
-  The evaluation methodology in an RFP contains elements (e.g. weighting factors, conversion or transition costs) which introduce an impermissible bias in favour of one product.
-  The evaluation methodology in the RFP is unclear, prone to manipulation, or contains overly subjective terms (e.g. the use of "consensus scoring").

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5. The actual evaluation of proposals did not follow the methodology and criteria announced in the RFP documents.
6. All proposals were not evaluated consistently. Mandatory and/or rated criteria were not applied even-handedly.
7. Equal information was not provided to all bidders.
8. The time allowed for preparation and submission of bids was unreasonably short and disadvantaged some bidders.
9. The contract was improperly awarded to a bidder whose bid ought to have been ruled non-compliant.

Grinding to a Halt

There are serious implications of a bidder's protest on the organization

1. If a contract has not been awarded, the process may be suspended
2. If the contract has been signed, its execution can be suspended
3. Protests can introduce delays that can derail organizational initiatives

Things to Remember

1. Ensure that roles and responsibilities are well defined and that they be clearly communicated and understood across the department.
2. Clarify any gaps and overlap in who should ensure compliance to policy and monitor the contracting process.
3. Clearly define and document internal procurement and contracting processes.

Academy Awards

Judging the Actors

Which Actor deserves the Academy Award for outstanding acting?

1. The Judge – Michel Larivière
2. DCRC's Lawyer – Robert Merrick
3. Complainant's Lawyer – Marc Whelan
4. Danny Shortcut – Daniel Jean
5. IP Nickels – Richard Deneault
6. Registrar – Robert Pilon